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Nos. 94-631, 94-797, and 94-929

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ZELL MILLER, *ET AL.*, *Appellants*,

v.

DAVIDA JOHNSON, *ET AL.*, *Appellees*.

LUCIOUS ABRAMS, JR., *ET AL.*, *Appellants*,

v.

DAVIDA JOHNSON, *ET AL.*, *Appellees*.

UNITED STATES OF AMERICA, *Appellant*,

v.

DAVIDA JOHNSON, *ET AL.*, *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

BRIEF *AMICI CURIAE* OF THE STATES OF TEXAS, ET AL. IN SUPPORT OF APPELLANTS

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INTEREST OF *AMICI CURIAE* STATES

Amici states submit this brief for one basic purpose: to highlight the threat to state primacy in fundamental redistricting decisions raised by lower court interpretations of the Court's opinion in *Shaw v. Reno*, 113 S.Ct. 2816 (1993).

The decisions of the lower courts in this case out of Georgia, in *Hays v. Louisiana*, 862 F.Supp. 119 (W.D. La. 1994), probable jurisdiction noted (Nos. 94-558 and -627), and in *Vera v. Richards*, 861 F.Supp. 1304 (S.D. Tex. 1994), appeals docketed (Nos. 94-805, -806, and -988), draw largely identical conclusions from widely divergent factual settings.[1] Particularly disturbing in these conclusions is the denigration of state policy choices which are independent of race but made in the maelstrom of redistricting where, by dint of both federal law and unavoidable reality, race necessarily plays a role. As these rulings signify, lower courts read *Shaw* as laying down such broadly prohibitory constitutional rules that they are overlooking significant state interests having nothing to do with race and how those interests play out in quite different ways in the widely differing politics of the various states. The Court emphasized that *Shaw's* prohibition was intended to reach the "exceptional cases," 113 S.Ct. at 2826, yet wielding the *Shaw* sword to strike down state enactments has become commonplace. *Shaw* should be confined to its original narrow channel.

The force of the lower courts' predominant approach -- combining the most open-ended of standing requirements with the most confining reading of the role of traditional, long-employed state policy considerations[2] -- threatens to convert state legislatures into mere

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[1] *Shaw v. Hunt*, 861 F.Supp. 408 (E.D.N.C. 1994), appeal docketed (No. 94-923), while upholding the North Carolina congressional redistricting effort, disposed of the standing question in a troubling, expansive fashion, and adopted a disturbingly narrow view of non-racial redistricting rationales.

[2] There are inconsistencies, though, on such fundamental legal points as what counts as a traditional districting principle. *Compare Johnson v. Miller*, 864 F.Supp. at 1369 (listing "protecting incumbents" as a traditional districting principle) *with Vera v. Richards*, 861 F.Supp. at 1335-36, and *Hays v. Louisiana*, 862 F.Supp. at 123.

formalistic checkpoints on the way to rigid federal judicial control of redistricting and impermissibly to frustrate conscientious state legislators by confronting them with indecipherable and possibly conflicting federal judicial dictates. If the lower court decision here stands, the path to constitutional redistricting will have become so narrow and obscure that the only way to successfully navigate it is either by sheer, blind luck or with a guide -- a federal judicial panel -- holding what amounts to a secret map but refusing to reveal it until journey's end.

The Court's stated principles reject such an outcome. "[R]eapportionment is primarily the duty and responsibility of the State . . . rather than of a federal court." *Voinovich v. Quilter*, 113 S.Ct. 1149, 1157 (1993). Furthermore, such a result would be anathema to the kind of federalism the Court has discerned in our federal Constitution, a federalism which acknowledges the unique and specially protected position of the states in making choices going to the heart of representative government. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991).

The states have a strong interest in seeing that *their* elected policymakers choose the non-constitutional ideas -- the traditional districting principles -- which inform the configuration of districts whose voters will elect their representatives in the national Congress. Now, before a major new round of redistricting has begun and expectations have settled around lower court interpretations of *Shaw v. Reno*, is the time to insure the states retain the authority which some of the lower courts hearing *Shaw* claims have taken away: the ability (and federalism-based right) to comply with the dictates of the Voting Rights Act while simultaneously balancing and honoring a panoply of other legitimate state interests.

Almost all states must redistrict congressional seats following the decennial census and accompanying decennial reapportionment.[3]

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[3] At this point, seven states do not have this obligation because they are apportioned only one congressional representative. They are Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont, and Wyoming. Congressional District Atlas, 103rd

All states must perform this task consistently with federal constitutional law (one-person/one-vote, partisan gerrymandering, and intentional racial vote dilution, plus, now, whatever the *Shaw* principle imposes) and federal statutory law (section 2 of the Voting Rights Act for all states and section 5 of the Voting Rights Act for some states)[4] as well as with the constitutional and statutory law of the various states.

The increasing complexity of our society, the population growth which forces more populous congressional districts because of the fixed number of overall seats, and the indifference of technological developments in communications and transportation to old political alignments and subdivisions mean that the next round of redistricting will call for even more difficult judgments about how to handle the vast array of state-based, often idiosyncratic considerations falling outside firmly established federal mandates. Our interest here is to help insure that *Shaw v. Reno* will no longer be read by lower federal courts in a fashion that denigrates non-racial state policy choices.

Aspirations to color-blindness should not be permitted to foist upon the states a tone-deafness to either their own unique political concerns or the private racial discrimination which sometimes accretes through the private ballot to become a powerful bloc of political exclusion. The lower court's overly expansive reading of *Shaw's* doctrine threatens precisely such a result, displacing the finely-tuned political ears of the people's elected state representatives with the figurative tin ear of an unelected federal judiciary in a matter lying at the heart of state governance. The states do not want this to happen.

Congress of the United States, vol. 1 at v (U.S. Dept. of Commerce Feb. 1993). By federal statute, all congressional districts must be single-member. 2 U.S.C. 2c.

[4] All or parts of sixteen states are subject to the preclearance requirements of section 5 of the Voting Rights Act, 42 U.S.C. 1973c. 28 C.F.R. Part 51 App. (listing the states, 9 of which are covered in their entirety and 7 of which have only parts covered, and giving the dates on which coverage was formally announced).

SUMMARY OF ARGUMENT

Constitutional standing to raise a *Shaw* claim was not implicitly or explicitly determined in *Shaw v. Reno*. In fact, the court expressly reserved on this issue. The requirement that a *Shaw* plaintiff demonstrate some kind of concrete harm from the state action giving rise to a *Shaw* claim certainly has not been eliminated, nor, under the Court's Article III jurisprudence, could it be. The lower court's explicit determination in this case that the plaintiffs had not demonstrated any harm should suffice to dispose of the case.

Shaw did provide markers for what would constitute standing by identifying the harms that could arise from a *Shaw* claim. Demonstrable evidence of increased racial polarization as a result of the creation of a contorted minority opportunity district or of a narrowing of the polity to which the representative elected from a challenged district responds, to a racially dominant group only, might suffice to establish the kinds of harm sufficient to impart standing.

Shaw cannot be read to preclude minority voters from engaging in the rough and tumble of political activity typically associated with redistricting. Such a reading would run counter to the basic meaning of the very constitutional provision on which the decision rests, the Equal Protection Clause. Further, it would constitute its own kind of explicit racial classification, requiring minorities to abstain from electoral politics while permitting all others to participate.

Yet, the effect of the lower courts' reading of *Shaw* is precisely to inject such disequilibrium into American redistricting politics. In part because of the posture in which the original case arrived at the Court, with the bare bones complaint about race forming the focal point of the decision, the lower courts have developed a kind of myopia about these cases. They misguidedly by attribute to race the distortions of the districts under attack, ignoring the political realities: that state political actors massage district boundaries to embed non-racial state policies into the districts finally drawn. Such traditional districting principles include incumbent protection, preservation of core districts, grouping of communities of interest (to which the unelected may be blind), and a

host of other state-based traditions that are intimately bound up with the political, economic and social life of the state.

Ultimately, what is at work here is the denigration of the state's fundamental right to make non-racial policy choices in this area and the arrogation to federal courts of their own non-constitutional preferences about how sovereign states should establish the basic structures to elect their representatives. *Shaw* was not a signal for such a break with longstanding, basic doctrines of federalism. This should be the occasion for the Court to re-confine *Shaw* to its original narrow compass and make clear again what was said in the original decision: it reaches only the "exceptional cases." The cases before the Court now do not fit this description, and they should be held to fall outside *Shaw's* reach.

ARGUMENT

In the context of redistricting challenges, standing principles are being read too expansively and traditional districting principles too narrowly. Palpable reality -- in terms of both individualized, concrete harm on the standing front and a clear-eyed, commonsense acceptance of everyday political concerns on the traditional districting principle front -- is in danger of being cast aside in the wake of *Shaw v. Reno*. *Shaw* does not require, or even countenance, such departures, and the *amici* states urge the Court to reiterate reality's place in *Shaw* jurisprudence.

I. STANDING IS A CONSTITUTIONAL PREREQUISITE WHICH MUST BE ESTABLISHED THROUGH PROBATIVE EVIDENCE OF THE KINDS OF HARMS (INCREASED POLARIZED VOTING AND SELECTIVELY INDIFFERENT LEGISLATIVE REPRESENTATION) IDENTIFIED IN *SHAW* AND WHICH CANNOT BE PRESUMED MERELY FROM THE PRESENCE OF OFFENDED SENSIBILITIES.

Standing is a threshold issue of constitutional dimension. The Court should delineate the contours of standing to raise a *Shaw* claim in the setting of this case, which has been fully tried on the merits, and make clear that the standing requirements applicable in other contexts

are fully applicable to redistricting cases and racial discrimination claims involving them.

Shaw v. Reno did not treat the standing issue at all. While some have expressed consternation about this omission, *see* Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 Sup.Ct.Rev. 245, 278 ("remarkable departure"), it is fully understandable in the specific context of the case as it came to the Court the first time. The lower court had dismissed the action for failure to state a claim. There was only a bare complaint, and the *Shaw* plaintiffs at that point had adduced no evidence on any issue, including any fact-specific issues of injury and causation of the type emphasized in *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992), as essential to the establishment of constitutional standing.

When the case came up on appeal from the district court's Rule 12(b)(6) dismissal, the Court expressly refused to note probable jurisdiction regarding a standing question proffered by the appellants.[5] Then, in its opinion, the Court explained that "[t]oday we hold *only* that appellants have stated a claim under the Equal Protection Clause . . ." 113 S.Ct. at 2832 (emphasis added). Whether the allegations of a complaint state a cause of action, and whether the particular plaintiffs making the allegations have standing to press the action, are entirely separate issues.

Despite the Court's refusal to reach the standing issue, the lower courts hearing *Shaw* claims have tended to find in the *Shaw* decision an implicit disposition of standing. *Shaw v. Hunt*, 861 F.Supp. at 427

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[5] *See* Jurisdictional Statement, No. 92-357, i ("Do white voters have standing to seek relief from congressional redistricting which was intended by both the state and federal defendants to result in the election of minority persons to Congress from two majority-minority districts?") In noting probable jurisdiction, the Court directed that "[a]rgument shall be limited to the following question:" "whether a state legislature's intent to comply with the Voting Rights Act and the Attorney General's interpretation thereof precludes a finding that the legislature's congressional redistricting plan was adopted with invidious discriminatory intent where the legislature did not accede to the plan suggested by the Attorney General but instead developed its own." *Shaw v. Barr*, 113 S.Ct. 653 (1992).

(*Shaw* "implied a standing principle"), *Vera v. Richards*, 861 F.Supp. at 1331 n.38 (Court "inferentially decided they had constitutional standing"), *and Johnson v. Miller*, 864 F.Supp. at 1370 (*Shaw* "implicitly recognizes"). Even were such a ruling "implicit" in *Shaw* -- and it was not -- the Court has repeatedly emphasized that implicit pronouncements on constitutional issues -- and standing is just such an issue -- do not settle them. *Edelman v. Jordan*, 415 U.S. 651, 671 (1974). Thus, standing in cases raising *Shaw* claims remains an open issue.

The lower courts' misreading of *Shaw* on standing, unless corrected by the Court, would dramatically increase the exposure of states to redistricting challenges by plaintiffs not constitutionally entitled to bring such claims and correspondingly enmesh the federal courts even further in micromanaging the details of core state activities. It would fly in the face of this Court's admonition that federal judges do not have "an unconditional authority to determine the constitutionality of legislative or executive acts," but may only do so where the constitutional requirements of a "case or controversy," including the threshold requirement of standing, are met. *Valley Forge Christian College v. Americans United*, 454 U.S. 464, 471 (1982).

Shaw v. Reno does not necessitate the approach taken by the lower courts and, in fact, offers a roadmap for elucidation of a standing principle in these kinds of cases that is far more consistent with extant standing doctrine than the open-ended approach of the lower court in this case.[6] One of the three essential elements of the constitutional law of standing is that plaintiffs must establish "injury in fact," meaning that they must demonstrate some harm that is "concrete and particularized" instead of merely "conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 112 S.Ct. at 2130. Generalized grievances are insufficient for standing, and the mere claim of a right to a particular type of conduct falls short of constitutional minimums. *Allen v. Wright*, 468 U.S. 737 (1984). *Northeastern Florida Chapter of the Associated General*

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[6] The different considerations applicable to standing to raise a vote dilution claim are not discussed here because, as *Shaw* explained, the claim it recognizes is "analytically distinct" from a vote dilution claim. 113 S.Ct. at 2830.

Contractors of America v. City of Jacksonville, 113 S.Ct. 2297 (1993), explaining that the existence of higher hurdles, not the likelihood of achieving a particular goal, imparts standing in an equal protection case, does not alter *Lujan's* fundamental requirement of an injury in fact. Even under *Northeastern Florida*, the benefit sought to be attained still must be concrete (as were the sought-after municipal construction contracts there).[7]

In explaining the kinds of concrete harms that might be attributable to a *Shaw* claim, the Court pointed to the possibility that creation of the kind of minority opportunity district targeted by the *Shaw* plaintiffs might exacerbate racial division by increasing racial bloc voting. 113 S.Ct. at 2827. Also, as another potential harm, the Court posited that representatives elected from the targeted minority opportunity districts might ignore their polity as a whole while focusing nearly exclusive attention on the dominant minority group in the district. *Id.*

However, whether one of these distinctive harms has actually occurred and is caused by a disputed districting plan is, like every issue of injury in a standing case, a question of fact. In this setting, as in all other standing cases, the plaintiffs bear the burden of demonstrating with probative evidence that the requisite injury had been caused by the districting plan at issue.

> The party invoking federal jurisdiction bears the burden of establishing these elements . . . Since they are not mere pleading requirements but rather *an indispensable part of the plaintiff's case*, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e. with the manner and degree of *evidence* required at the successive stages of litigation . . . [T]hose facts . . .

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[7] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), similarly requires a palpability in the goal which is sought to be attained. Once Allan Bakke could clear the challenged hurdles to admission, he wanted a medical education and degree. This concrete goal was essential to his standing. 438 U.S. at 280 n.14.

> must be "supported adequately by the *evidence* adduced at the trial . . . "

Lujan v. Defenders of Wildlife, 112 S.Ct. at 2136-37 (emphasis added; internal citations omitted).

The plaintiffs in this case appear to have offered no evidence going to these two types of harms that must be associated with a *Shaw* claim, and the lower court made no findings about the existence of such harms.[8] They thus have failed to establish the requisite injury in fact.

Shaw v. Reno could not have rested on any generalizations about injuries arising from the impact of irregularly shaped districts drawn with a race-consciousness. The kind of claim it recognized was, by the Court's own terms, new, rare, and exceptional. Until the instant case and the *Louisiana v. Hays* case, no case which had been tried on the merits involving a *Shaw* claim had made its way to the Court. The *Shaw* opinion even continues the emphasis that "racial bloc voting . . . never can be assumed, but specifically must be proved in each case," 113 S.Ct. at 2830, a proposition which necessarily carries with it the requirement that *increases* in bloc voting be proven.

Similarly, the Court has explained that evidence is required to establish that an elected official will fail to represent all of his or her constituents. In *Davis v. Bandemer*, 478 U.S. 109 (1986), the Court held:

> An individual who votes for a losing candidate is usually deemed . . . to have as much opportunity to influence that candidate as other voters in the district. We cannot presume in such a situation, without *actual proof* to the contrary, that the candidate elected will entirely ignore the interests of those voters . . . [W]ithout *specific supporting evidence*, a court cannot presume . . . that those who are elected will disregard the . . . under-represented group.

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[8] These types of harms cannot be assumed; indeed there is evidence to the contrary in the Louisiana, Texas and Maryland cases. See Appendix A.

478 U.S. at 132 (emphasis added).

Other lower courts have suggested that "stigmatization" by a race-based redistricting plan might impart standing, a proposition embraced by some of the parties before this Court in other cases. *See, e.g., Richards v. Vera*, No. 94-805, Appellees' Motion to Affirm at 15. Yet, the Court in *Allen v. Wright*, 468 U.S. 737 (1984), rejected precisely such stigmatic harm as inadequate to establish standing. There, the Court stressed that stigmatic injury is never sufficient to support standing unless accompanied by proof of "some *concrete* interest with respect to which respondents are personally subject to discriminatory treatment. That interest must *independently* satisfy the causation requirement of standing doctrine." *Id.* at 757 n.22 (emphasis added). The same absence of concrete injury that was fatal to standing in *Allen* is fatal to the stigmatic injury claim in this case.

The lower court in this case did make an explicit finding relevant to the standing issue. It determined that the plaintiffs "suffered no individual harm [and that] the 1992 congressional redistricting plans had no adverse consequences for these white voters." 864 F.Supp. at 1370. The fact that the court then went on to find standing demonstrates the abandonment of standing principles for *Shaw v. Reno* claims. The Court has not countenanced such an abandonment and cannot do so without overruling, at a minimum, *Allen v. Wright*.

Offended sensibilities were not enough for standing in *Allen v. Wright*, and they are not enough for standing in cases such as this one. Furthermore, the harms the Court has identified as possibly associated with a *Shaw* claim are not to be presumed; they must be proven as part of the plaintiff's case on standing. That did not happen in this case, and it does not appear to have happened in the other *Shaw* cases now pending before the Court.

Until the decision in *Baker v. Carr*, 369 U.S. 186 (1962), just over thirty years ago, redistricting law fell largely outside federal jurisdiction for reasons of justiciability. Now, under the lower court's theory at any rate, we have moved to the point where there are virtually

no justiciability restraints in this arena even though standing doctrine is widely perceived to have moved onto a more restrictive constitutional path. This unjustified expansion of *Shaw v. Reno's* reach calls out for correction by the Court.

II. THE LOWER COURTS' APPLICATIONS OF *SHAW V. RENO* UNDERMINE STATE PRIMACY IN REDISTRICTING, IGNORE POLITICAL REALITIES, AND REST ON THE UNACCEPTABLE PRINCIPLE THAT MINORITY VOTERS MUST ESCHEW POLITICAL GIVE AND TAKE IN WHICH ALL OTHER VOTERS PARTICIPATE.

In *Shaw v. Reno*, the Court recognized a new, "analytically distinct" claim in the equal protection law of redistricting and voting rights.

> [R]edistricting legislation [is unconstitutional if it] is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification.

113 S.Ct. at 2824.

But nothing in *Shaw* serves to undo the Court's longstanding acceptance of the quite obvious fact that politics in all its forms, both refined and raw, plays a central role in redistricting decisions. Labeling efforts to squeeze politics out of the redistricting process "politically mindless," the Court has noted the "impossible task of extirpating politics from what are the essentially political processes of the sovereign states." *Gaffney v. Cummings*, 412 U.S. 735, 753-54 (1973):

> Nor is the goal of fair and effective representation furthered by making the standards of reapportionment so difficult to satisfy that the reapportionment task is recurringly removed from legislative hands and performed by federal courts which themselves must make the *political decisions* necessary to formulate a plan or accept

> those made by reapportionment plaintiffs who may have *wholly different goals* from those embodied in the official plan. From the very outset, we recognized that the reapportionment task dealing as it must with fundamental "choices about the nature of representation," . . . is primarily a political and legislative process.

Gaffney, 412 U.S. at 749 (emphasis added; internal citations omitted).

Shaw's necessarily narrow frame of reference has had unfortunate consequences for the lower courts deciding cases in its wake. Confined as it was to the pleadings, virtually its only ingredient was race; the rich stew of trial that holds other ingredients -- an especially diverse mixture in redistricting cases -- had not yet begun to be prepared.

This confined focus of the *Shaw* opinion has induced a myopia in the lower courts. Wherever they look, they seem to see only race.[9] This reflects "a naive vision of politics," to use a phrase from *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 103 (1990) (Scalia, J. dissenting). More than race nearly always informs congressional (or, for that matter, any) redistricting. It is safe to observe that congressional districts never are drawn in a vacuum; potential candidates are evaluated and potential political repercussions are pored over regardless of whether a particular district is intended to be a minority opportunity district satisfying the commands of the Voting Rights Act or the redoubt of some important or long-powerful state political figure.

For this decade's round of redistricting, the technology for these kinds of evaluations, in the form of sophisticated computer systems, had evolved to become at least an order of magnitude more powerful than ever before and the raw information similarly more voluminous and

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[9] For example, highly integrated, single-county urban districts have been struck down, *see Vera v. Richards, supra*, in the face of *Shaw's* description of the archetype of a distorted district. Such a district, posited the Court, is one that includes "individuals who belong to the same race, but who are otherwise *widely separated by geographical and political boundaries*." 113 S.Ct. at 2827 (emphasis added).

more detailed. Population data, for example, was available down to the census block level for the first time, and there were *7 million* such blocks. Congressional District Atlas, *supra* n.3, vol. 1 at v. The result of this technological evolution tended to be the same in the political redistricting world as biological evolution has in the natural one: increased complexity of organization.

Some of the information used in this decade's redistricting was racial in character. Compliance with sections 2 and 5 of the Voting Rights Act, not to mention the antidiscrimination principle of the Equal Protection Clause, required it. The census information on race also provided other useful insights about the consequences of drawing congressional district lines in one place or another, but only when used in combination with other data and the political knowledge peculiarly available to elected officials.[10]

It hardly follows from such uses, though, that race is the sole[11] or even dominant factor accounting for the ultimate shaping of any given district. It would be, to borrow a phrase from *Shaw*, an "exceptional case[]" in which this were so. Working from the tandem elements of a *Shaw* claim -- that the district shape be irregular (i.e., wildly inconsistent with traditional districting practices) and that the sole (or even dominant) reason for the irregularity be race -- it might be possible to arrive at an idea of an archetypal district which would require

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[10]For example, in regions where racial voting patterns tend to divide along partisan lines, useful information about the partisan tendencies of a particular area could be gleaned from a sophisticated reading of such census data to get a reading "on the basis of their politics rather than their race or ethnicity[,]" *Rutan*, 497 U.S. at 108 (J. Scalia, dissenting). The Court has seen such phenomena at work in electoral settings and even found it determinative as a non-racial explanation for questioned voting activity. *See, e.g., Whitcomb v. Chavis*, 403 U.S. 124 (1971). Lower courts have taken a similar tack in rejecting section 2 claims, finding partisan activity where plaintiffs assert racial patterns. *See, e.g., League of United Latin American Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc), *cert. denied*, 114 S.Ct. 878 (1994) (rejecting section 2 challenge to Texas judicial election system).

[11]In a California redistricting case, the court read *Shaw* as condemning redistricting based "solely" on race. *DeWitt v. Wilson*, 856 F.Supp. 1409, 1412 (E.D.Cal. 1994), appeal docketed (No. 94-275). But other lower courts, including the one here, expand the Court's language on this point. *See* 864 F.Supp. at 1373-74.

the state to satisfy the twin tests of compelling interest and narrow tailoring. If circumstances in the state, especially those surrounding the question of whether racial bloc voting persists, were such that reasonable legislators drawing district lines would not have concluded that section 2 of the Voting Rights Act required the creation of a minority opportunity district and that (for those covered) section 5 of the Voting Rights Act required the maintenance of such a district, and if they nonetheless drew such a district by meticulously searching for blocs of racial minorities to string together into a district without regard to state-based districting principles, then a *Shaw* claim could be made out.

In a less extreme scenario, it was not infrequent during the last round of redistricting that legislators preparing to redraw their state's congressional districts were confronted with circumstances indicating that failure to draw a minority district in a region of the state[12] would result in liability under section 2. Political reality suggests that they would hardly simply turn on the computer, find a concentration of minority voters sufficient to satisfy section 2's requirements,[13] and then draw the district lines in as neat a fashion as geography and the computer would permit. *That* would constitute making race the clearly dominant, if not sole, factor in the shape of a district, and *that* would probably constitute a *Shaw* violation, especially if the district were misshapen and there were an absence of meaningful communities of interest among the district's residents.

But *that* scenario is not what happens in the real world of political redistricting. Once it is determined that the Voting Rights Act is going to require the creation or maintenance of a minority opportunity

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[12]Despite the Court's having left open the question of whether the proper frame of reference in a statewide redistricting for a statewide body for evaluating the first *Gingles* factor (geographic compactness and sufficient minority population) is localized or statewide, *Johnson v. DeGrandy*, 114 S.Ct. 2647, 2662 (1994), legislatures as a practical matter tend to assess the question by region. It is noteworthy that the United States, which urged a statewide frame of reference, *id.*, is the principal enforcer of section 5 of the Voting Rights Act.

[13]A leading section 2 standard requires a threshold of 50% minority voting age population to create a minority opportunity district. *See Brewer v. Ham*, 876 F.2d 448 (5th Cir. 1989).

district, a host of other factors and players make their appearance. Those factors and players (for example, incumbent members of Congress, or their surrogates, from the affected region) begin to mold the districts as much as they can so that Voting Rights Act compliance can coexist with other political interests and redistricting principles. When the molding is complete, the likelihood is high that the neat lines of the initial conceptual minority district have been changed, even distorted, to accommodate other interests having nothing to do with race. A minority opportunity district, compliant with the Voting Rights Act and perforce drawn with some attention to race, will continue to exist but as part of the state's larger political, economic and social life. As long as the non-racial considerations affecting the ultimate boundary lines for such a minority opportunity district are reasonably related to the state's larger political, economic or social life and the purpose of redistricting, a *Shaw* claim should fail.

Assuming sections 2 and 5 of the Voting Rights Act themselves are constitutional (an unchallenged proposition in the *Shaw* cases to date), to hold otherwise, and constitutionally forbid politics-driven distortion of minority opportunity districts while permitting it for other districts, would create its own invidious racial classification. It would set up one rule for the creation of minority opportunity districts -- politics is forbidden and only purely racial considerations shall operate -- and quite another for non-minority (*i.e.*, white dominant) districts. In short, minorities would be forbidden to play non-racial politics that are fully available to everyone else. [14] Not only is such a result not required by the Equal Protection Clause; it runs directly counter to it. *Cf. DeGrandy*, 114 S.Ct. at 2661 ("minority voters are not immune from the obligation to pull, haul, and trade" in the political sphere).

The appropriate test of whether the factors driving the shapes of minority opportunity districts are reasonably related to the state's larger political economic or social life is keyed to the traditional districting

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[14] At least one of the lower courts hearing a *Shaw* claim insists on such a rule for minority opportunity districts. *Vera v. Richards*, 861 F.Supp. at 1343 (district "must have the *least possible amount of irregularity in shape*, making allowance for the traditional districting criteria") (emphasis added).

principles referenced in *Shaw*. Consistent with the longstanding doctrine that redistricting is primarily a state function, *see, e.g., Growe v. Emison*, 113 S.Ct. 1075, 1081 (1993), state law and state tradition are the proper source for discerning traditional districting principles. Certainly, federal law is not the place to look. In *Wood v. Broom*, 287 U.S. 1, 7 (1932), the Court held that the 1929 federal reapportionment act for Congress *deliberately* omitted requirements of compactness and contiguity for congressional districts. These requirements never have been reinstated in federal law.

This, however, is a state-specific inquiry; just as the Court recognizes that different constitutional requirements flow from the states' different rules about property, *Board of Regents v. Roth*, 408 U.S. 564 (1971), so too must it recognize that different *Shaw* implications flow from the states' different traditions about redistricting. The specialized redistricting abstention doctrine applied in *Growe v. Emison* is implicit recognition of this proposition.

Some states have explicit congressional redistricting requirements. West Virginia, in article I, section 4, of its constitution requires compactness and contiguity. California, in article XXI, section 1, of its constitution requires "respect" for the "geographical integrity of any city, county, or city and county, or of any geographical region" to the extent possible without violating other standards. Some states, on the other hand, have no explicit constitutional or statutory redistricting requirements for congressional seats. Texas, for example, falls in this latter category.

To discern in any given case whether a state has distorted minority districts with an indifference to its traditional districting criteria, a court considering a *Shaw* claim must look to several potential sources. State constitutional and statutory law on the topic, state case law, prior redistricting and political history, and contemporaneously-created districts other than the one under challenge all must be evaluated. If a minority opportunity district is severely distorted (for example, far beyond the kind of hypothesized district that might satisfy the first *Gingles* threshold factor in a section 2 setting) and creeps in and

out of city boundaries,[15] while other contemporaneous *non*-minority districts in the state do not do so, then further inquiry may be warranted to determine whether other traditions -- *e.g.*, incumbent protection and preservation of the core of old districts, *White v. Weiser*, 412 U.S. 783, 791 (1973) -- explain the result.

The lower courts decisions to date in *Shaw* cases, however, fail to accord sufficient weight to the states' own legitimate traditions. By giving an unduly pinched reading to "traditional districting criteria," lower courts ignore the reality that these criteria spring from the states and their political, economic and social traditions, not from some free-floating federal ideal. The approach of the lower courts raises the concerns flagged by the plurality in *Moore v. City of East* Cleveland, 431 U.S. 494, 502 (1977) (Powell, J.) ("there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court").

If left unchecked, this unduly restrictive view -- constitutionally unwarranted and federalism-insensitive -- inevitably will create strong disincentives for state compliance with the Voting Rights Act. State legislators hardly are going to embrace the Voting Rights Act and willingly comply with section 2's strictures if they are being told by the federal courts that, in doing so, they must sacrifice a host of other perfectly legitimate objectives in a rippling effect across the state or region. The *Shaw* doctrine requires no such unraveling of states' rights or of the protections afforded minority voters by the Voting Rights Act. It does not require a state to choose between its own non-racial politics and a recognition, where the facts warrant it, of the need to account for the reality of private racial biases, *cf. Palmore v. Sidoti*, 466 U.S. 429, 433 (1984), in the way it groups voters into districts to roughly counterbalance those biases.

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[15]Political subdivision boundaries themselves carry no imprimatur of purity. Section 5's preclearance requirement applies to changes in such boundaries precisely because they are subject to manipulation for racial ends. *See City of Pleasant Grove v. United States*, 479 U.S. 462 (1987) (upholding preclearance denial to annexation).

Shaw is not a license to lower courts to ignore legitimate state policy choices or to pick and choose among them according to what fits their judicial sensibilities. The states urge the Court to reinstate their primacy in the redistricting field, consistent with the longstanding principle the Court has embraced since redistricting became litigable in the federal courts.

CONCLUSION

For the foregoing reasons, the *amici curiae* states urge reversal of the decision of the court below.

Respectfully submitted,

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APPENDIX

Summary of Record Evidence In Redistricting Cases Showing Decreasing Racial Polarization in Minority Opportunity Districts

The facts, taken from the record in this and other cases, show that the creation of minority opportunity districts has not exacerbated racially polarized voting. To the contrary, expert evidence on racially polarized voting shows that white voting for minority candidates generally has *increased* in minority opportunity districts. For example, Districts 2 and 11 in Georgia became minority opportunity districts for the first time in 1992. From 1984 to 1990, only one percent of white voters in the precincts now within District 2 voted for black and hispanic candidates in statewide elections. The corresponding white vote for black and hispanic candidates in District 11 was only four percent. A dramatic increase in white voting for black and hispanic candidates occurred in 1992, simultaneously with the first campaigns in the new minority opportunity congressional districts. Twenty-nine percent of white voters in District 2 and 37 percent of white voters in District 11 voted for black and hispanic candidates in statewide elections in 1992.[1]

Evidence from other States shows that minority opportunity districts, including irregularly-shaped districts, have resulted in increased white support for minority candidates. In 1984, only 8 percent of white voters voted for the black candidate in the Democratic congressional primary in what is now Louisiana, District 2. In 1990, the first year as minority opportunity district, 44% of white voters voted for black candidates and in 1992 the white vote for black candidates rose to 74%. (Years between 1984 and 1990 did not involved any black vs. white congressional elections that could be included in the analysis). Louisiana's District 4 became a minority opportunity district in 1992. From 1986 to 1990, white voting for black congressional candidates in that District ranged from a low of 3% (3 elections) to a high of 22% (one election). In 1992, white voting for black candidates rose to 58%. Declaration of Richard Engstrom, July 20, 1994, Chart One, *Hays v. Louisiana.*

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[1] *See* DOJ Ex. 24, Report of Dr. Allan J. Lichtman, May 26, 1994, Tables 1-3.

In Texas, the chart below[2] reports pre-1992 and 1992 white voting for Black candidates in Texas' two African American opportunity districts (Districts 18 and 30) and for Hispanic candidates in Texas' seven Hispanic opportunity districts.

TEXAS POLARIZED VOTING
ELECTIONS HELD IN MAJORITY-MINORITY
CONGRESSIONAL DISTRICTS MINORITY VERSUS WHITE
ELECTIONS 1992 AND PRE-1992

	Minority Opportunity Districts								
	15	16	18	20	23	27	28	29	30
% WHITE VOTE FOR BLACK/HISPANIC CANDIDATES *									
1992 ELECTIONS	37%	33%	29%	25%	16%	50%	0%	5%	64%
PRE-1992 ELECTIONS	22%	30%	24%	6%	9%	27%	7%	5%	15%

* Results are averages for Statewide, Countywide and Legislative District elections held within the precincts of the minority opportunity districts. 1992 results for Districts 27, 28, and 30 are based on one election.

In both African American districts, white bloc voting *decreased* in 1992. This decrease in white bloc voting occurred even though District 18 was made more irregular by the 1991 redistricting and District 30 is admittedly irregular in shape (although no more irregular than majority-white districts in Texas). Significantly, District 30, the newly-created African American opportunity district

[2] From information set out in State Ex. 14, Final Report of Dr. Alan J. Lichtman, App. 2 Tables 1-9, *Vera v. Richards*.

in Dallas, showed a large increase in white vote for black candidates, from only 15% of white voters in pre-1992 elections to 64% in 1992.

Texas' Hispanic opportunity districts show a consistent pattern, with substantial decreases in white bloc voting in 5 districts, no change in one district (29) and an increase in only one of seven districts (28). Significantly, the single district which showed an increase in white bloc voting, District 28, is not irregularly shaped and was found to meet constitutional requirements by the District Court in *Vera v. Richards*.

Maryland is also consistent. A new African American opportunity district, District 4, was created in the 1991 redistricting. White voting for black congressional candidates in Prince George's County, where both new District 4 and old District 5 were centered, increased from 0% in the 1990 Democratic primary to 44% in the 1992 Democratic primary. Plaintiff's Trial Ex. 22, Affidavit of Theodore S. Arrington, Sept. 6, 1993, Table 4, *NAACP v. Schaeffer*, 849 F. Supp. 1022 (D. Md. 1994).

TEXAS POLARIZED VOTING
ELECTIONS HELD IN MAJORITY-MINORITY
CONGRESSIONAL DISTRICTS 1992 AND PRE-1992

	DISTRICT								
	15	16	18	20	23	27	28	29	30
% WHITE VOTE FOR BLACK/HISPANIC CANDIDATES									
1992 ELECTIONS	37%	33%	29%	25%	16%	50%	0%	5%	64%
PRE-1992 ELECTIONS	22%	30%	24%	6%	9%	27%	7%	5%	15%

* 1992 RESULTS FOR DISTRICTS 27, 28, AND 30 ARE BASED ON ONE ELECTION.

SOURCE: FINAL REPORT OF DR. ALLAN J. LICHTMAN, APPENDIX 2, TABLES 1-9, AL VERA ET AL. V. ANN RICHARDS ET AL.

GEORGIA POLARIZED VOTING
ELECTIONS HELD IN SECOND AND ELEVENTH
CONGRESSIONAL DISTRICTS BLACK VERSUS WHITE
ELECTIONS 1992 AND PRE-1992*

	DISTRICT	
	2ND	11TH
% WHITE VOTE FOR BLACK/HISPANIC CANDIDATES *		
1992 ELECTIONS	29%	37%
PRE-1992 ELECTIONS	1%	4%

* RESULTS ARE AVERAGES FOR STATEWIDE ELECTIONS HELD WITHIN THE PRECINCTS OF THE SECOND AND ELEVENTH DISTRICTS, 1984-1990 AND 1992.

SOURCE: REPORT OF DR. ALLAN J. LICHTMAN, REPORT ON ISSUES RELATING TO GEORGIA CONGRESSIONAL DISTRICTS, MAY 26, 1994, TABLES 1-3, DAVIDA JOHNSON, ET AL. V. ZELL MILLER, ET AL.

LOUISIANA POLARIZED VOTING: 2ND AND 4TH CONGRESSIONAL DISTRICTS BLACK VERSUS WHITE CONGRESSIONAL ELECTIONS: 1984 TO 1992

SECOND DISTRICT: BECAME MAJORITY BLACK IN 1990 *

	1984 PRIMARY	1990 PRIMARY	1992 PRIMARY
% WHITE VOTE FOR BLACK CANDIDATES	8%	44%	74%

FOURTH DISTRICT: BECAME MAJORITY BLACK IN 1992 **

	1986 PRIM	1986 RUN	1988 PRIM	1988 RUN	1990 PRIM	1992 PRIM
% WHITE VOTE FOR BLACK CANDIDATES	3%	22%	3%	15%	3%	58%

* THERE WAS ONE BLACK CANDIDATE AND FOUR WHITE CANDIDATES IN THE 1984 PRIMARY; SIX BLACK CANDIDATES AND SIX WHITE CANDIDATES; AND TWO BLACK CANDIDATES AND ONE WHITE CANDIDATE IN THE 1992 PRIMARY. THE SECOND DISTRICT IS BASED IN NEW ORLEANS AND HAS CONSIDERABLE OVERLAP DURING THE PERIOD STUDIED HERE.

** THERE WAS ONE BLACK CANDIDATE AND FOUR WHITE CANDIDATES IN THE 1986 PRIMARY; ONE BLACK CANDIDATE AND ONE WHITE CANDIDATE IN THE 1986 RUNOFF; ONE BLACK CANDIDATE AND FOUR WHITE CANDIDATES IN THE 1988 PRIMARY; ONE BLACK CANDIDATE AND ONE WHITE CANDIDATE IN THE 1988 RUNOFF; ONE BLACK CANDIDATE AND TWO WHITE CANDIDATES IN THE 1990 PRIMARY; AND SIX BLACK

CANDIDATES AND TWO WHITE CANDIDATES IN THE 1992 PRIMARY. THE FOURTH DISTRICT IS BASED OUTSIDE OF NEW ORLEANS AND HAS LIMITED OVERLAP FOR THE PERIOD BEFORE AND AFTER THE 1992 REDISTRICTING.

SOURCE: DECLARATION OF RICHARD ENGSTROM, JULY 20, 1994, CHART ONE, RAY HAYS ET AL. V. STATE OF LOUISIANA, ET AL.

MARYLAND POLARIZED VOTING:
FIFTH AND FOURTH CONGRESSIONAL DISTRICTS:
BLACK VERSUS WHITE CONGRESSIONAL ELECTIONS
PRINCE GEORGE'S COUNTY 1990 & 1992

	ELECTION	
	1990 DEM. PRIMARY	1992 DEM. PRIMARY
% WHITE VOTE FOR BLACK CANDIDATES	0%	44%

* AFTER THE 1990 ELECTION, IN THE POST-1990 REDISTRICTING, THE FIFTH CONGRESSIONAL DISTRICT, BASED IN PRINCE GEORGE'S COUNTY WAS REDRAWN. A NEW MAJORITY BLACK DISTRICT, THE FOURTH CONGRESSIONAL DISTRICT, WAS CREATED THAT WAS LARGELY BASED IN PRINCE GEORGE'S COUNTY. IN THE 1990 DEMOCRATIC PRIMARY, BLACK CANDIDATE ABDUL MUHAMMAD RAN UNSUCCESSFULLY AGAINST INCUMBENT STENNY HOYER IN THE FIFTH DISTRICT. IN 1992, SEVERAL BLACK AND WHITE CANDIDATES RAN FOR THE DEMOCRATIC NOMINATION FOR THE OPEN SEAT IN THE FOURTH DISTRICT. ELECTION RESULTS FOR THE TWO YEARS ARE FOR PRINCE GEORGE'S COUNTY ONLY.

SOURCE: AFFIDAVIT OF THEODORE S. ARRINGTON, SEPTEMBER 6, 1993, TABLE 4, NAACP ET AL. V. WILLIAM DONALD SCHAEFER ET AL.